

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

IN THE MATTER OF THE WINDING DOWN OF:

THE NEW HAMPSHIRE MEDICAL MALPRACTICE
JOINT UNDERWRITING ASSOCIATION

No. 217-2015-CV-00347

**RECEIVER'S AMENDED MOTION FOR APPROVAL OF
INTERIM DISTRIBUTION, INTERPLEADER AND RELATED
DISCHARGE PURSUANT TO RSA 404-C:17**

Roger A. Sevigny, Insurance Commissioner for the State of New Hampshire, as Receiver ("Receiver") of the New Hampshire Medical Malpractice Joint Underwriting Association ("NHMMJUA"), with the assent of certain policyholders appearing in this proceeding, moves for an order approving the interim distribution and interpleader of sixty million dollars (\$60,000,000) from the NHMMJUA estate and discharge of the Receiver with respect to those funds pursuant to RSA 404-C:17, III. As reasons therefor, the Receiver states:

1. The Receiver filed the original Receiver's Motion for Approval of Interim Distribution, Interpleader and Related Discharge Pursuant to RSA 404-C:17 on February 21, 2017. On April 3, 2017, the Court deferred action pending briefing on certain issues. The issues were ultimately certified to the New Hampshire Supreme Court, and on March 13, 2018, the Supreme Court issued an Order answering the certified questions and remanding to this Court. The Receiver now files this amended motion in light of the Order and the time since the original motion. The amended motion is essentially the same as the original motion except that it addresses some intervening events and increases the amount of the proposed interim distribution

and interpleader from \$50 million to \$60 million. Affidavit of Peter A. Bengelsdorf, Special Deputy Commissioner, in Support of Approval of Interim Distribution, Interpleader and Related Discharge dated May 4, 2018 (“Bengelsdorf Aff.”) ¶ 2.

2. The Order of Rehabilitation issued on July 22, 2015 appointed the Receiver to wind down the business of the NHMMJUA in accordance with RSA 404-C:15 -:17 and RSA 402-C. The Receiver has been winding down the NHMMJUA’s business as reported in the Receiver’s monthly status reports. Most significantly, the Receiver entered an Assumption Agreement with The Medical Protective Company (“MedPro”) providing for MedPro’s assumption of NHMMJUA coverage-related obligations in accordance with RSA 404-C:17, III. The Court approved the Assumption Agreement, as amended, on August 5, 2016, and the transaction closed on August 25, 2016. Bengelsdorf Aff. ¶ 3.

3. The Receiver has paid the price called for by the Assumption Agreement to MedPro. The Receiver has also paid the ongoing administrative and operational expenses of the NHMMJUA and the expenses of the receivership on an ongoing basis as set forth in the monthly Receiver’s reports and financial statements. Bengelsdorf Aff. ¶ 4.

4. The Receiver continues to wind down the NHMMJUA. In particular, the Receiver is working to resolve tax issues. The Receiver worked with Leone, McDonnell & Roberts (“Leone”), the NHMMJUA’s accountants, to prepare final tax filings for the NHMMJUA based on the September 30, 2016 financial statements. The Receiver filed the final federal and state returns on February 21, 2017. The Receiver also filed a federal Form 4810 “Request for Prompt Assessment” to trigger an 18-month period for the United States Internal Revenue Service (“IRS”) to act on open tax years and made a similar request for action to the New Hampshire Department of Revenue Administration (“DRA”). On May 26, 2017, the IRS

notified the Receiver that the closing date for the tax year 2013 would be September 23, 2017, and the closing date for the 2014 and 2015 tax years and the 2016 stub year will be September 2, 2018. The Receiver did not receive any IRS tax due notices for the 2013 tax year, so that year is now closed. As to state taxes, the Receiver and the DRA executed an Audit Agreement resolving all state tax issues for open tax years in September 2017. Bengelsdorf Aff. ¶ 5.

5. In the Assumption Agreement, the Receiver agreed to indemnify MedPro for any breach of the Receiver's representations and for any claims asserted against MedPro arising from the Excluded Claims. The Assumption Agreement provided that the indemnities would terminate on the first anniversary of the closing (which was on August 25, 2016). The one-year indemnity period passed without any claims for indemnity being asserted by MedPro. Bengelsdorf Aff. ¶ 6.

6. As noted in recent reports, the Receiver considered issues concerning the treatment of the Stabilization Reserve Fund ("SRF"). The Receiver concluded, based upon the regulations in effect when the surcharges that funded the SRF were collected and subsequently, that the NHMMJUA is obligated to return the approximately \$3.2 million remaining in the SRF to providers that paid surcharges. Accordingly, on March 16, 2018, the Receiver filed a Motion for Approval of Return of Stabilization Reserve Fund Excess to Health Care Providers ("SRF Motion"). As described in the Receiver's reports, the Receiver is separately accounting for the remaining SRF funds. The Court granted the SRF Motion and issued an Order Approving Return of Stabilization Reserve Fund Excess to Health Care Providers ("SRF Order") on March 28, 2018. The Receiver has begun the process for returning SRF funds set forth in the SRF Order. Under the Order, any SRF amounts not returned to health care providers are to be turned

over to the Abandoned Property Division of the New Hampshire Treasury one year from the date of that order. Bengelsdorf Aff. ¶ 7.

7. Given the SRF return process and remaining potential tax issues, it appears likely that the NHMMJUA receivership will stay open for approximately another year. Bengelsdorf Aff. ¶ 8.

8. The statute concerning closure of the NHMMJUA provides for the interpleader of assets remaining after the NHMMJUA's business is wound down (including transfer of coverage-related obligations and resolution of tax obligations) into another action on this Court's docket for the purpose of adjudicating policyholder claims in those funds:

Prior to the receiver's discharge . . . , all assets remaining after court approval of the receiver's transfer of all of the NHMMJUA coverage-related obligations, payment of the NHMMJUA's administrative and operational expenses, transfer or resolution of tax obligations, and payment of receivership expenses, shall be interpleaded into the Merrimack county superior court, docket no. 217-2010-CV-00414, for the purposes of adjudicating all policyholder claims in those funds. The interpleader into docket no. 217-2010-CV-00414 shall not prejudice the rights of any class of NHMMJUA policyholders with respect to those funds. If any class of NHMMJUA policyholders cannot be represented or is barred from the old action, a new interpleader action shall be commenced to allow such policyholders to assert their claims with respect to the funds. Neither the state of New Hampshire nor any agency thereof shall have any claim to these funds.

RSA 404-C:17, III (emphasis added). The reference to Docket No. 217-2010-CV-00414 is to the action captioned Georgia Tuttle, M.D., LRGHealthcare and Derry Medical Center, On Behalf of Themselves And Those Similarly Situated v. New Hampshire Medical Malpractice Joint Underwriting Ass'n, in which excess funds as determined by former RSA 404-C:14, II were distributed (the "Tuttle Action").

9. The statute further provides that the rights of NHMMJUA policyholders in the remaining NHMMJUA assets shall be determined in the interpleader action without involvement of the Receiver:

The provisions of RSA 404-C:15-RSA 404-C:17 shall not alter, and shall not be construed to alter, any vested contractual rights that any class of NHMMJUA policyholders may have with respect to NHMMJUA assets. The existence and extent of any such rights shall be determined by the interpleader court after termination of the receivership proceeding.

RSA 404-C:17, IV(a) (emphasis added).

10. In the circumstances, and in the interest of facilitating payment to NHMMJUA policyholders from the interpleader proceeding, the Receiver has considered whether it would be possible to make an interim distribution and interpleader of a sum while leaving an appropriate amount in the NHMMJUA estate to address expenses and other obligations of the NHMMJUA estate. The NHMMJUA's net assets (assets after deduction of the hardship fund, the SRF, and a small amount of incurred but unpaid expenses) as of March 31, 2018 totaled approximately \$85.5 million. Bengelsdorf Aff. ¶ 9.

11. In the Receiver's judgment, retaining \$25 million in net assets in the NHMMJUA estate is sufficient to address the remaining costs and obligations of the NHMMJUA in receivership, including the administrative and operational expenses of the NHMMJUA, the expenses of the receivership, the remaining tax obligations, if any, of the NHMMJUA, and to provide a reasonable reserve for unknown and unexpected obligations of the NHMMJUA. Bengelsdorf Aff. ¶ 10.

12. The Receiver has accordingly concluded that there are sufficient NHMMJUA assets to make an interim distribution of \$60 million to be interpleaded into the Tuttle Action in accordance with RSA 404-C:17, III. Such an interim distribution and interpleader will permit the interpleader action to proceed with adjudication of NHMMJUA policyholder interests in the interpleaded funds and distribution as determined by the interpleader court. Funds that remain in

the reserve after resolution of tax and other issues will be the subject of a subsequent interpleader of funds by the Receiver. Bengelsdorf Aff. ¶ 11.

13. However, the distribution of part of the NHMMJUA estate will reduce the assets available if some unexpected issue arises. An order approving the interim distribution and interpleader accordingly should (a) discharge the Receiver as to the distributed funds; (b) provide that all obligations of and claims against the NHMMJUA and the Receiver are limited to the assets that remain in the NHMMJUA estate after the distribution; and (c) confirm that the Receiver and his agents and advisers shall have no liability on account of the interim distribution. Bengelsdorf Aff. ¶ 12.

14. In accordance with the approach to the interpleader set out in RSA 404-C:17, IV, the Receiver should be discharged and dismissed from the interpleader proceeding once the interpleader court has accepted the interpleader. Bengelsdorf Aff. ¶ 13.

15. The NHMMJUA estate funds are presently held by the Receiver in investment accounts managed by Deutsche Investment Management Americas Inc. (“Deutsche”) in accordance with investment guidelines approved by the Court. To facilitate the interpleader, the Receiver proposes that upon entry of an order of the interpleader court accepting the interpleader and approving investment of the interpleaded funds in Treasury bills and cash, the Receiver will transfer the interpleaded funds into an account under the control of the interpleader court to be managed by Deutsche under a separate contract and invested in Treasury bills and cash outside of the receivership. Bengelsdorf Aff. ¶ 14.

16. The Receiver accordingly requests the Court’s approval to file a bill of interpleader pursuant to RSA 404-C:17 to interplead an interim distribution of \$60 million in the

Tuttle Action as described above. The proposed bill of interpleader, including a proposed form of acceptance order, is attached as Exhibit A. Bengelsdorf Aff. ¶ 15.

WHEREFORE, the Receiver requests, with the assent of policyholders appearing in this proceeding, that the Court:

- a. Grant this motion;
- b. Issue an order approving distribution, interpleader and discharge in the form submitted herewith (1) approving an interim distribution in the amount of \$60 million from the NHMMJUA assets; (2) directing the Receiver to interplead the interim distribution amount into the Tuttle Action by filing the proposed bill of interpleader; (3) discharging the Receiver of all liability with respect to the distributed funds; (4) limiting all obligations of and claims against the NHMMJUA and the Receiver to the assets that remain in the NHMMJUA estate after the interim distribution; and (5) confirming that the Receiver has no liability on account of the interim distribution; and

c. Grant such other relief as equity and justice may require.

Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE COMMISSIONER
OF THE STATE OF NEW HAMPSHIRE, SOLELY AS
RECEIVER OF THE NEW HAMPSHIRE MEDICAL
MALPRACTICE JOINT UNDERWRITING
ASSOCIATION

By his attorneys,
ANN M. RICE
DEPUTY ATTORNEY GENERAL

J. Christopher Marshall, NH Bar No. 1619
Civil Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
christopher.marshall@doj.nh.gov
(603) 271-3650



J. David Leslie, NH Bar No. 16859

dleslie@rackemann.com

Eric A. Smith, NH Bar No. 16952

esmith@rackemann.com

Rackemann, Sawyer & Brewster P.C.

160 Federal Street

Boston, MA 02110

(617) 542-2300

May 7, 2018

Certificate of Service

I hereby certify that a copy of the foregoing Receiver's Amended Motion for Approval of Initial Distribution, Interpleader and Discharge Pursuant to RSA 404-C:17, were sent this 7th day of May, 2018, by first class mail, postage prepaid to all persons on the attached service list.



Eric A. Smith

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

IN THE MATTER OF THE WINDING DOWN OF:

THE NEW HAMPSHIRE MEDICAL MALPRACTICE
JOINT UNDERWRITING ASSOCIATION

)
)
) No. 217-2015-CV-00347
)
)
)
)

SERVICE LIST

Kevin M. Fitzgerald, Esq.
W. Scott O'Connell, Esq.
Nixon Peabody LLP
900 Elm Street, 14th Floor
Manchester, NH 03101-2031

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 217-2010-CV-00414

Georgia Tuttle, M.D., LRGHealthcare and Derry Medical Center,
On Behalf of Themselves And Those Similarly Situated

v.

New Hampshire Medical Malpractice Joint Underwriting Association

BILL OF INTERPLEADER PURSUANT TO RSA 404-C:17

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire (“Commissioner”), solely in his capacity as Receiver (“Receiver”) of the New Hampshire Medical Malpractice Joint Underwriting Association (“NHMMJUA”), hereby interpleads to the jurisdiction and control of this Court assets from the NHMMJUA estate in the sum of sixty million dollars (\$60,000,000) pursuant to RSA 404-C:17.

1. The Commissioner is the duly appointed Receiver of the NHMMJUA pursuant to the Order of Rehabilitation issued on July 22, 2015 in In the Matter of the Winding Down of the New Hampshire Medical Malpractice Joint Underwriting Association, Merrimack County Superior Court Docket No. 217-2015-CV-00347 (the “Receivership Proceeding”). The Order of Rehabilitation appointed the Receiver to wind down the business of the NHMMJUA in accordance with RSA 404-C:15 -:17 and RSA 402-C.

2. This Bill of Interpleader is filed pursuant to RSA 404-C:17, III and order of the Court supervising the Receivership Proceeding. The Legislature has determined that there is a

need for this proceeding to adjudicate the rights of NHMMJUA policyholders in these funds and distribute the funds. The statute provides that assets remaining in the NHMMJUA estate after the NHMMJUA's obligations are satisfied "shall be interpleaded by the receiver into the Merrimack county superior court, docket no. 217-2010-CV-00414, for the purpose of adjudicating all policyholder claims in those funds." RSA 404-C:17, III.

3. The Court supervising the Receivership Proceeding approved this distribution of \$60,000,000 from the NHMMJUA estate to be interpleaded into this action by Order Approving Interim Distribution, Interpleader and Related Discharge of Receiver issued on _____, 2018. The order authorizes the distribution of the funds from the NHMMJUA estate, the interpleader of the funds into this Court by this bill of interpleader, and the discharge of the Receiver and the NHMMJUA from all claims, liabilities, and obligations with respect to the interpleaded funds.

4. The interpleaded funds are presently held by the Receiver in investment accounts with managed by Deutsche Investment Management Americas Inc. ("Deutsche") in accordance with investment guidelines approved by the Receivership Court. Upon entry of an order of this Court accepting the interpleader and approving investment in Treasury bills and cash, the Receiver will transfer the interpleaded funds into an account under the control of the interpleader court to be managed by Deutsche under separate contract and invested in Treasury bills and cash under the control of and to be delivered on order of the Court.

5. The Receiver interpleads the funds as directed by RSA 404-C:17, III. Pursuant to the statute and the Order Authorizing Interim Distribution, Interpleader and Related Discharge, the Receiver and the NHMMJUA have no interest in the funds. Further, under the statute, "[n]either the state of New Hampshire nor any agency thereof shall have any claim to these

funds.” RSA 404-C:17, III. The funds are being interpleaded by the Receiver “for the purposes of adjudicating all policyholder claims in [the] funds.” Id.

6. The rights of NHMMJUA policyholders in the interpleaded funds should be determined by this Court after the Court has dismissed the Receiver as interpleading party. The statute mandating this interpleader provides for the Receiver not to be involved in the determination of rights in the funds. It provides that “[t]he existence and extent of any such [policyholder] rights shall be determined by the interpleader court after termination of the receivership proceeding.” RSA 404-C:17, IV(a).

7. The Receiver accordingly requests that the Court issue an order determining that interpleader of the funds is properly filed under RSA 404-C:17, discharging the Receiver from any liability with respect to the interpleaded funds, and dismissing the Receiver from this action.

8. A proposed order accepting the interpleader of the funds, discharging the Receiver from liability with respect to the funds, dismissing the Receiver and approving investment in Treasury bills is submitted herewith. The Receiver has reviewed the proposed order with Kevin Fitzgerald of Nixon Peabody LLP, counsel for certain NHMMJUA policyholders and counsel for the class of NHMMJUA policyholders certified in this matter with respect to the earlier distribution of NHMMJUA surplus funds in 2012. Counsel assents to entry of an order in the form proposed.

PRAYER FOR RELIEF

WHEREFORE, the Receiver respectfully requests that this Court enter an order in the form proposed:

- a. Granting this Interpleader and accepting jurisdiction and control over the \$60,000,000 pursuant to RSA 404-C:17, III;

- b. Approving the proposed investment in Treasury bills and arrangements regarding the handling of the interpleaded funds;
- c. Discharging the Receiver from all claims, liabilities and obligations with respect to the interpleaded funds and dismissing the Receiver from this action; and
- d. Granting such other and further relief as is just under the circumstances.

Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE COMMISSIONER
OF THE STATE OF NEW HAMPSHIRE, SOLELY AS
RECEIVER OF THE NEW HAMPSHIRE MEDICAL
MALPRACTICE JOINT UNDERWRITING
ASSOCIATION

By his attorneys,

ANN M. RICE
DEPUTY ATTORNEY GENERAL

J. Christopher Marshall, NH Bar No. 1619
Civil Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
christopher.marshall@doj.nh.gov
(603) 271-3650

J. David Leslie, NH Bar No. 16859
dleslie@rackemann.com
Eric A. Smith, NH Bar No. 16952
esmith@rackemann.com
Rackemann, Sawyer & Brewster P.C.
160 Federal Street
Boston, MA 02110
(617) 542-2300

Dated: _____, 2018

Certificate of Service

I hereby certify that a copy of the foregoing Bill of Interpleader Pursuant to RSA 404-C:17, was mailed this ____ day of _____, 2018 by first class mail, postage prepaid to all persons on the attached service list.

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 217-2010-CV-00414

Georgia Tuttle, M.D., LRGHealthcare and Derry Medical Center,
On Behalf of Themselves And Those Similarly Situated

v.

New Hampshire Medical Malpractice Joint Underwriting Association

[PROPOSED]

ORDER ACCEPTING INTERPLEADER AND DISCHARGING RECEIVER

On consideration of the bill of interpleader pursuant to RSA 404-C:17 filed by Roger A. Sevigny, Insurance Commissioner for the State of New Hampshire, as Receiver (“Receiver”) of the New Hampshire Medical Malpractice Joint Underwriting Association (“NHMMJUA”), it is hereby found and ORDERED as follows:

1. The bill of interpleader is properly filed pursuant to RSA 404-C:17.
2. The \$60,000,000 in interpleaded funds shall be held under the jurisdiction and control of the Court.
3. Until further order of the Court, the interpleaded funds shall be held in an investment account managed by Deutsche Investment Management Americas Inc. (“Deutsche”) under separate contract and invested in Treasury bills and cash.
4. Deutsche shall have no liability for decrease in value or other loss with respect to investments in Treasury bills.
5. The Receiver is discharged from all claims, liabilities, and obligations with respect to the interpleaded funds.

6. The Receiver is dismissed from this action and shall not further participate in this action with regard to these interpleaded funds.

So Ordered.

Dated: _____

Presiding Justice